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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 99-___

ARTHUR CALDERON, Warden

Petitioner,

v.

CHARLES E. McDOWELL, JR.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION
AND
MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

DEATH PENALTY CASE

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent Charles E. McDowell, Jr., by his undersigned counsel, asks leave to file his Brief in Opposition to the instant Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis,* pursuant to Rule 39. Respondent has been represented by the undersigned court-appointed attorney in the United States District Court for the Central District of California and in the United States Court of Appeals for the Ninth Circuit, pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.

DATED: March 1, 2000

Andrea G. Asaro
Counsel for Respondent
Charles E. McDowell, Jr.

QUESTION PRESENTED

In February 1994, during federal habeas corpus proceedings, the district court entered a protective order limiting the Attorney General's disclosure of certain documents produced to him in discovery, consisting of copies of confidential documents from trial counsel's files. In September 1998, in its order granting the writ of habeas corpus as to the sentence of death, the court reaffirmed that the protective order would remain in effect.

- Did the Ninth Circuit Court of Appeals, *en banc*, correctly conclude: (1) that the district court did not abuse its discretion in denying the Attorney General's Rule 59(e) motion for reconsideration of the district court's September 1998 order, where the Attorney General alleged neither the discovery of new evidence nor an intervening change in the law; and (2) that the district court did not commit clear error in issuing the protective order?

TABLE OF CONTENTS

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* i

QUESTION PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 5

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Calderon v. U.S. District Court N. D. Cal. (Nicolaus),
98 F.3d 1102 (9th Cir. 1996),
cert. denied, ___ U.S. ___, 137 L.Ed.2d 1036 (1997) 2

Hickman v. Taylor,
329 U.S. 495 (1947) 8

Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills,
141 F.3d 1284 (8th Cir. 1998) 6

McDowell v. Calderon,
130 F.3d 833 (9th Cir. 1997) (*en banc*),
cert. denied, ___ U.S. ___, 140 L.Ed.2d 807 (1998) 1

McDowell v. Calderon,
197 F.3d 1253 (9th Cir. 1999) (*en banc*) ..... passim

On Command Video Corporation v. Lodgenet Entertainment Corporation,
976 F.Supp. 917 (N.D. Cal. 1997) 9

Pasatiempo v. Aizawa,
103 F.3d 796 (9th Cir. 1996) 6

Poliquin v. Garden Way, Inc.
989 F.2d 527 (1st. Cir. 1993) 8

Rodriguez v. Fullerton Tires Corp.,
115 F.3d 81 (1st Cir. 1997),
aff'd 115 F.3d 81 (1st Cir. 1998) 6

Seattle Times Co. v. Rhinehart
467 U.S. 20,
cert. denied, 467 U.S. 1230 (1984) 8

United States v. Simmons,
390 U.S. 377 (1968) 8

Upjohn Co. v. United States,
449 U.S. 383 (1981) 8

Wharton v. Calderon,
127 F.3d 1201 (9th Cir. 1997) 2

Younger v. Harris,
401 U. S. 37 (1971) 3, 8

STATUTES

Rule of the Supreme Court of the United States
Rule 10 5

Federal Rules of Civil Procedure
Rule 26(c) 8
Rule 59(e) ..... passim

Rules Governing Section 2254 Cases
Rule 6 7

TREATISES

C. Wright, et al, Federal Practice and Procedure (1995 Ed.)
§ 2040 9
§ 2041 9
§ 2810.1 6

Manual for Complex Litigation (Third), Federal Judicial Center (1995)
§ 41.36 9

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CHARLES E. McDOWELL, JR.

Respondent.

Respondent Charles E. McDowell, Jr. ("McDowell"), respectfully requests that this Court deny the petition for writ of certiorari filed by petitioner Arthur Calderon (the "Warden"), seeking review of the Ninth Circuit's *en banc* opinion in this case. That opinion is reported at 197 F.3d 1253 (9th Cir. 1999) (*en banc*).

STATEMENT OF THE CASE

This is a capital case. In December 1990, after exhausting his state court remedies McDowell initiated federal habeas corpus proceedings. In November 1997 the Ninth Circuit, *en banc*, reversed McDowell's death sentence on the basis of an instructional error. McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997), cert. denied, ___ U.S. ___, 140 L.Ed.2d 807 (1998). McDowell was then retried in state court. On December 1, 1999 he was again sentenced to death.

In February 1994, when the parties were litigating McDowell's habeas corpus petition in the district court, the court granted a motion by the Warden for

discovery of McDowell's former trial counsel's files, subject to a Protective Order, which provides as follows:

> All documents produced to [the Warden] pursuant to [the Warden's] motion to discover trial counsel's file shall be deemed to be confidential. These documents may be used only by representatives from the Office of the California Attorney General and may be used only for purposes of any proceedings incident to the petition for writ of habeas corpus pending before this Court. Disclosure of the contents of the documents and the documents themselves may not be made to any other persons or agencies, including any law enforcement or prosecutorial personnel or agencies without an order from this Court. This order shall continue in effect after the conclusion of the habeas corpus proceedings and specifically shall apply in the event of a retrial of all or any portion of petitioner's criminal case.

Warden's Appendix C. The Protective Order thus prohibits the Attorney General from disclosing the documents produced to him in discovery, consisting of copies of confidential documents obtained from McDowell's trial counsel's files, outside the scope of the federal habeas corpus proceedings.

The Warden sought reconsideration of the Protective Order in the district court, which was denied, but did not seek review in the Ninth Circuit, either under the collateral order doctrine, see, e.g., Wharton v. Calderon, 127 F.3d 1201 (9th Cir. 1997) (protective order in habeas corpus proceedings is reviewable under collateral order doctrine), or by way of writ of mandate, see, e.g., Calderon v. U.S. District Court N. D. Cal. (Nicolaus), 98 F.3d 1102 (9th Cir. 1996), cert. denied, ___ U.S. ___, 137 L.Ed.2d 1036 (1997) (petition for writ of mandate is appropriate vehicle for warden in federal habeas corpus proceeding to challenge pre-petition discovery order). Instead, the Attorney General accepted discovery of Bates-stamped copies of confidential documents from trial counsel's files, subject to the terms and conditions of the Protective Order.

After conducting an evidentiary hearing on McDowell's ineffective assistance of counsel claims the district court denied all relief, and McDowell appealed. The Warden did not challenge the Protective Order by way of cross-appeal. The Ninth Circuit, *en banc*, reversed the death sentence and remanded the case to the district court with instructions to issue the writ of habeas corpus as the penalty phase of McDowell's trial.

On September 15, 1998, the district court issued its "Order Issuing Writ of Habeas Corpus." Warden's Appendix D. The last sentence of the court's order states that the Protective Order "shall remain in effect." Id. at 2. The Warden did not appeal that order. Instead, the Warden filed a motion for reconsideration, under Fed. R. Civ. P. 59(e). The district court denied that motion by order filed November 2, 1998. Warden's Appendix E. The Warden then appealed the denial of the Rule 59(e) motion.

On April 7, 1999, a three-judge panel issued an opinion holding that the Protective Order should not have been issued and directing the district court to vacate it, on the grounds, *inter alia*, that it constituted an "anticipatory interference" with state court proceedings, in violation of Younger v. Harris, 401 U. S. 37 (1971). Warden's Appendix B at 3217. McDowell sought rehearing and *en banc* review on the grounds, *inter alia*, that the Younger abstention was inapplicable as a matter of law because no state court proceeding was pending either when the Protective Order was issued, or when the district court issued its September 15, 1998 Order stating that the Protective Order would "remain in effect."

The Ninth Circuit granted rehearing *en banc*, withdrew the three-judge panel opinion, and on December 1, 1999, issued its opinion affirming the district court's denial of the Warden's Rule 59(e) motion. McDowell v. Calderon, 197 F.3d 1253, (9th Cir. 1999) (*en banc*). The Court noted that the only order before

the Court was the district court's November 2, 1998 order denying the Warden's motion for reconsideration; the Warden never appealed either the Protective Order itself when it was issued in 1994, or the district court's September 15, 1998 order reaffirmed that it would "remain in effect." Id. at 1254-1255. The Court noted that the Warden did not alleged (much less establish) either the discovery of new evidence or an intervening change in the law, which are grounds for relief under Rule 59(e), and therefore concluded that the underlying Protective Order was subject to review under the "clear error of law" standard. Id. at 1255.

The Court then construed the Protective Order as merely prohibiting the Attorney General from disclosing the documents produced to him during the habeas corpus proceedings, and noted that the parties had conceded that the Protective Order did not preclude the District Attorney, on retrial in state court, from independently seeking access to the original documents using the means available under state law. Id. at 11255 and n. 5. ("The parties agree that the protective order does not preclude the District Attorney from seeking to obtain from McDowell's original trial counsel the same documents that were turned over to the Attorney General. Any such attempt would be governed by state law.") The Court noted that district courts have broad discretion in fashioning protective orders, and concluded that the Protective Order in this case did not "fall clearly outside the bounds of that authority." Id.

McDowell was retried during the pendency of the *en banc* proceedings and was again sentenced to death.

REASONS WHY THE PETITION SHOULD BE DENIED

THE *EN BANC* DECISION BELOW DOES NOT CONFLICT WITH ANY FEDERAL PRECEDENT FROM THIS COURT OR ANY CIRCUIT COURT

The Warden has failed even to argue, much less to show, that this case meets the standards governing review on writ of certiorari, as generally set out in Rule 10 – i.e., that the *en banc* decision below conflicts with the decision of any other United States court of appeals, or departs from the accepted and usual course of judicial proceedings. This case, in fact, fails to meet the requirements of Rule 10.

Contrary to the Warden's assertion that the standard of review applied by the Court below is "wholly irrelevant" (Petition at 11), the procedural posture of this case is in fact dispositive and renders this case inappropriate for review on writ of certiorari. The Court below properly identified and applied established standards of review. Moreover, the Protective Order itself is substantively unobjectionable. It is not directed to the state court, and did not interfere with state trial court proceedings, which in any event are now concluded.

I. The Ninth Circuit, *En Banc,* Correctly Concluded That The District Court Did Not Abuse Its Discretion In Denying the Warden's Rule 59(e) Motion.

As the Court below noted, the Warden never appealed the Protective Order itself. The Court therefore properly concluded that the issue before it was whether the district court had abused its discretion in denying the Warden's Rule 59(e) motion to reconsider the September 15, 1998 Order reaffirming the Protective Order. Because the Warden failed to allege either the existence of newly discovered evidence or an intervening change in the law, and thus failed to meet the standards for reconsideration under Rule 59(e), the Court concluded that the Warden could not establish abuse of discretion. The Court therefore reviewed the

Protective Order itself under the "clear error" standard. Applying the "clear error" standard of review, the Court correctly noted that district court's have broad discretion in fashioning discovery orders, and concluded that the issuance of the Protective Order was not clearly erroneous.

The Court's handling of this appeal was procedurally and substantively correct. It is well established that reconsideration of a judgment under Rule 59(e) is an extraordinary remedy. C. Wright, et al, Federal Practice and Procedure, § 2810.1, at 124 (1995 Ed.). The denial of a motion for reconsideration under rule 59(e) is reviewed for abuse of discretion. Pasatiempo v. Aizawa, 103 F.3d 796, 801 (9th Cir. 1996); Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284 (8th Cir. 1998); Rodriguez v. Fullerton Tires Corp., 115 F.3d 81 (1st Cir. 1997), aff'd 115 F.3d 81 (1st Cir. 1998). Although specific grounds for a motion to "amend or alter" are not spelled out in the rule, relief is typically granted only if the movant seeks to present newly discovered or previously unavailable evidence, or if there has been an intervening change in controlling law. C. Wright, et al, Federal Practice and Procedure, supra, § 2810.1, at 124-127.

As the Court below correctly noted, the Warden did not even allege either of these elements. McDowell, 197 F.3d at 1255. The Court thus properly concluded that the district court did not abuse its discretion in denying the Warden's Rule 59(e) motion, and then reviewed the judgment sought to be reconsidered – the September 15, 1998 order reaffirming that the Protective Order "shall remain in effect" – for clear error. As explained below, the Protective Order in fact well withstands scrutiny under this standard of review.

II. The Ninth Circuit, *en Banc*, Correctly Concluded That The District Court Did Not Commit Clear Error In Issuing the Protective Order

Ignoring the procedural posture of this case and the applicable standards of review, the Warden argued in the Ninth Circuit, and argues here, that by issuing the Protective Order the district court "wrongfully" precluded the state court from ruling on state law questions pertaining to the attorney-client privilege, and "meddl[ed]" in "ongoing" state criminal proceedings. See, e.g., Petition at 9. The Warden's belated objections to the Protective Order are unavailing.

First, the Warden ignores the plain terms of the Protective Order, which covers only those documents actually produced to the Warden in response to his request for discovery in the course of the federal habeas corpus proceedings – i.e., the Attorney General's copies of those documents produced from McDowell's trial counsel's files subject to the Protective Order. The Protective Order thus states: "All documents produced to respondent pursuant to respondent's motion to discover trial counsel's file shall be deemed to be confidential. These documents may be used only by representatives from the Office of the California Attorney General and may be used only for purposes of any proceedings incident to the petition for writ of habeas corpus pending before this Court." Appendix C. As the Court below noted, nothing in the Protective Order prevented the District Attorney, on retrial, from independently seeking access to McDowell's trial counsel's files. McDowell, 197 F.3d at 1255, n. 5. Such attempts would be governed by state law. Ibid. The District Attorney simply may not obtain them from the Attorney General, who obtained them in federal court under federal law – i.e., pursuant to Rule 6 of the Rules Governing Section 2254 Cases – in order to rebut McDowell's federal claims of ineffective assistance of counsel. Thus, contrary to the Warden's assertion, by issuing the Protective Order the district court did not "wrongfully invade the sovereign jurisdiction of the co-equal

California courts." Petition at 9.

Moreover, because no state court proceedings were pending either when the district court issued its Protective Order in 1994 or when it reaffirmed it in September 1998, the Younger abstention doctrine is wholly inapplicable, as a matter of law. Petition at 9; Younger v. Harris, 401 U.S. 37 (1971). When the parties were litigating McDowell's habeas corpus claims in federal district court, all state court appellate and post-conviction proceedings had been concluded. That is what the exhaustion requirement compels. McDowell's subsequent state court retrial obviously was not "pending" until after the federal habeas corpus proceedings had been concluded with the issuance of the writ of habeas corpus – i.e., well after the Protective Order had been issued and then reaffirmed.

Finally, as the Court below acknowledged, "district courts have broad discretion to fashion discovery orders under Fed. R. Civ. P. 26(c), and the protective order did not fall clearly outside the bounds of that authority." McDowell, 197 F.3d at 1256; see also Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984), cert. denied, 467 U.S. 1230 (1984); Poliquin v. Garden Way, Inc., 989 F.2d 527, 532 (1st. Cir. 1993). The Protective Order covers the Attorney General's copies of certain documents that were maintained by McDowell's former trial counsel in connection with McDowell's 1984 trial. The Attorney General obtained these privileged and confidential documents only because the district court granted his motion for leave to take discovery under Rule 6 of the Rules Governing Section 2254 Cases. By asserting claims of ineffective assistance of counsel McDowell waived only the attorney-client privilege, as to those claims only; he did not waive any other applicable privilege or protection, including the work product doctrine, see Hickman v. Taylor, 329 U.S. 495, 510-512 (1947); Upjohn Co. v. United States, 449 U.S. 383, 400 (1981), or the Fifth Amendment privilege, see United States v. Simmons, 390 U.S. 377 (1968). The

Protective Order thus permitted the Warden to defend against McDowell's claims of ineffective assistance of counsel, while preserving the confidentiality of McDowell's trial counsel's files for other purposes.

The Protective Order is hardly extraordinary in limiting the disclosure of confidential information to the federal action in which the discovery was obtained. See, e.g., On Command Video Corporation v. Lodgenet Entertainment Corporation, 976 F.Supp. 917 (N.D. Cal. 1997) (use in subsequently filed state court action of documents covered by protective order issued in federal action constitutes violation of protective order warranting finding of contempt; protective order intended to limit use of subject documents to the federal litigation). District courts routinely use protective orders to control discovery by limiting disclosure of privileged or propriety documents to the federal litigation before them. See, e.g., Manual for Complex Litigation (Third), Federal Judicial Center (1995) § 41.36; C. Wright, et al., Federal Practice & Procedure, supra, §§ 2040, 2041.

CONCLUSION

For the foregoing reasons, respondent Charles E. McDowell, Jr., respectfully requests that the petition for writ of certiorari be denied.

Dated: March 7, 2000

ROSEN, BIEN & ASARO, LLP

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Charles E. McDowell, Jr.